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Iris Corp Bhd v Tan Sri Razali bin Ismail & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-1736–09 OF 2022
RAVINTHRAN, CHOO KAH SING AND AHMAD FAIRUZ JJCA
8 SEPTEMBER 2025

C *Companies and Corporations — Directors — Breach of duty — Business judgment rule — Company sued directors for breaches of duties in relation to failed investment — Judicial Commissioner found directors made business judgment pursuant to s 214 of Companies Act 2016 — Judicial commissioner dismissed company's claim against directors for breach of duties — Whether* D *judicial commissioner erred in finding that directors were protected by business judgment rule — Whether directors made business judgment for proper purpose and in good faith — Whether directors did not have material personal interest in subject matter of business judgment — Whether directors were informed about subject matter of business judgment — Whether directors reasonably believed that* E *business judgment was in best interest of company — Whether directors conducted 'independent assessment' pursuant to s 215(2)(b) of Companies Act 2016 — Whether court should avoid 'hindsight bias' in reviewing directors' decision — Whether chief executive officer (CEO) or managing director (MD) protected by business judgment rule — Whether test for breach of duty satisfied — Whether* F *judicial commissioner was correct in applying s 581 of Companies Act 2016 to relieve directors of liability — Whether decision of judicial commissioner was plainly wrong — Companies Act 2016 ss 214(1), 215(2)(b) & 581*

Iris Corp Bhd ('the appellant') had sued the respondents for alleged breaches of G directors' duties in relation to a failed investment in Border Control Solution Ltd ('the BCS Investment'), a United Kingdom company ('the appellant's claims'). Specifically, the appellant alleged that the respondents had breached fiduciary duties, duties to act in good faith, duties of care and skill, and various statutory duties under the Companies Act 2016 ('Act 777'). Additionally, as H against the second respondent as the Chief Executive Officer ('CEO') and managing director ('MD'), the appellant's claim was in relation to his appointment of Joseph Vijay Kumar ('JVK') as consultant and the related payments made to JVK. The appellant sought damages of approximately RM11.7m representing the total amount invested in and paid to BCS and its I sole shareholder, JVK. In support of its case, the appellant relied on the investigative report by Ernst & Young Services Sdn Bhd ('the EY investigation') which stated that there were irregularities in relation to the BCS investment and that there were potential breaches of directors' duties. The respondents on the other hand relied on the earlier investigative reports by Ferrier Hodgson

MH Sdn Bhd ('the FH report') which stated that there were no irregularities in the BCS Investment and that the investment was 'commercially considered and approved'. At the end of the proceedings, the learned judicial commissioner ('the JC') dismissed the appellant's claims premised on the following findings: (a) the respondents were credible witnesses and their evidence pointed to a collective decision to make the BCS Investment and such decision was honestly arrived at, bona fide and in the best interests of the company as a whole and not exercised for an improper purpose; (b) the respondents' decision, in the circumstances that existed when the Directors' Circular Resolution ('DCR') was signed by all respondents to affect the BCS Investment, fell within the statutory business judgment rule; (c) there was material evidence that the respondents had substantial prior knowledge of the UK immigration privatisation project through various means including personal meetings, office visits and Board awareness of the appellant's intended participation; (d) the JC preferred the FH report over the EY investigation because an in-depth investigation was not carried out by EY and the evidence of PW6 (EY's representative) was unconvincing and ought to be treated with caution; and (e) the date of signing the DCR was immaterial. Aggrieved by the JC's decision, the appellant filed the present appeal.

Held, dismissing the appeal with costs and affirming the decision of the JC:

(1) The court agreed with the analysis of the JC that: (a) the statutory business judgment rule in s 214 of Act 777 encapsulated the common law business judgment rule as set out in *Howard Smith Ltd v Ampol Ltd* [1974] AC 821; (b) the law to be applied was Act 777 as the present suit was filed after Act 777 became effective; and (c) based on the evidence, the following four cumulative requirements under s 214(1) of Act 777 were satisfied: (i) the respondents made the business judgment for a proper purpose and in good faith; (ii) the respondents did not have a material personal interest in the subject matter of the business judgment; (iii) the respondents were informed about the subject matter of the business judgment to the extent the respondents reasonably believed to be appropriate under the circumstances — in this regard, there was material evidence that the respondents had substantial prior knowledge of the UK immigration privatisation project through various means; and (iv) the respondents reasonably believed that the business judgment was in the best interest of the company (see paras 29 & 32–46).

(2) With respect to the requirement of 'independent assessment' under s 215(2)(b) of Act 777, the High Court's finding that the respondents conducted independent assessment based on their briefing, viewed in light of their prior knowledge and extensive Board experience, was reasonable. Independent assessment did not mandate comprehensive due diligence or sceptical inquiry, but rather an unbiased analysis of

information provided, having regard to the director's knowledge of the company and complexity of its operations (see paras 48 & 50).

(3) The business judgment rule existed, in part, to protect directors from the unfair application of hindsight bias in judicial review of their decisions. This protective principle was essential to maintaining an environment where qualified individuals would serve as directors and where legitimate business risk-taking was encouraged rather than penalised through retrospective judicial scrutiny. Accordingly, it was the court's finding that the BCS Investment decision was made strictly within the timeline of the information and circumstances available to the respondents at the material time, without reference to subsequent developments or information that became available only after the investment decision was made including the evidence of PW6 who rendered her opinion on what should have been done to safeguard the appellant's interest in the BCS Investment (see paras 58 & 64–65).

(4) The JC was entirely correct in preferring the FH report, which concluded that the BCS Investment was 'commercially considered and approved' with 'no irregularities observed', over the incomplete and potentially biased EY investigation for the following reasons: (a) deficiencies in the EY investigation – in this regard, EY had only completed Phase 1 of what was intended to be a two-phased investigation, and EY also failed to conduct interviews with the relevant directors who had made the investment decision; (b) PW6 was not a credible witness; and (c) the FH report was demonstrably more reliable than the EY investigation because: (i) the FH report was conducted much closer in time to the relevant events; (ii) the scope of the FH report was wider than that of the Phase 1 of EY investigation; and (iii) the FH report was commissioned by the appellant's original Board, including directors who had been involved in the BCS Investment decision (see paras 66–74).

(5) The court was satisfied that the JC had correctly absolved the second respondent from liability. The JC had correctly applied the business judgment rule to protect the second respondent's decisions. The court agreed with the JC that the second respondent's action in appointing JVK as consultant fell within his authority as MD and were protected by the business judgment rule. Further, the consultancy payments were reasonable in amount and frequency, reflecting the value of JVK's services. There was also no evidence that the second respondent obtained personal financial benefit from the BCS Investment or JVK's appointment. His decisions appeared to be motivated by company benefit assessment rather than personal gain (see paras 76–77, 79, 81 & 83).

(6) The learned JC correctly recognised that the precise signing dates of the DCR were not material to the central legal issues. Whether directors

signed on 6 January 2016 or 23 February 2016, the key question remained whether they acted with appropriate care, in good faith and in the company's best interests based on the information available to them. The evidence established that regardless of signing dates, the respondents had substantial prior knowledge of the BCS project and received appropriate briefings before making their decision. The timing of documentation did not affect the substance of their decision-making process or the protection afforded by the business judgment rule (see paras 89–90).

(7) The Federal Court in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177 ('Petra Perdana') clearly established that the test for breach of duty combined both subjective and objective elements. The test was subjective in assessing the director's state of mind and whether the director genuinely considered the exercise of discretion was in the company's best interest. The test was objective in that the director's assessment was subject to objective review by the courts. The objective element required the court to assess whether 'an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company' (see paras 97–99).

(8) Applying this test to the facts, the following factors supported the conclusion that reasonable directors in the respondents' position could genuinely believe the BCS Investment would benefit the company: (a) the investment leveraged the company's core expertise in trusted identification technology, an area where it had demonstrated world-leading capabilities over two decades; (b) the UK Border Force privatisation represented a substantial government contract with significant revenue potential; (c) the company had already invested resources in the project through staff secondment and proposal development, suggesting management's positive assessment of its viability; (d) the respondents brought extensive Board experience and deep knowledge of the company's business to their assessment; and (e) they received briefings from experienced management with specific expertise in the relevant technology. Therefore, the JC's conclusion that the respondents' belief was objectively reasonable was well-founded and consistent with the Petra Perdana standard (see paras 100–102).

(9) Section 581 of Act 777 empowered the court to relieve directors from liability where they have acted honestly and reasonably and ought fairly to be excused.The evidence established that the respondents acted honestly throughout the relevant period, believing that their decisions would benefit the company. Their actions were also reasonable given their knowledge of the company's business, their experience in the

industry, and the information available regarding the BCS project. Therefore, the JC was not wrong in applying s 581 of Act 777 (see paras 107–108 & 111).

(10) In relation to the eighth respondent's failure to appear at trial or give evidence, while the appellant correctly cited O 35 r 1(2) of the Rules of Court 2012 ('the ROC 2012') which permitted a court to proceed with trial in a party's absence, this general provision did not override the specific procedural requirements for obtaining default judgment. The court agreed with the JC's finding that: (a) she was not at liberty to waive production by the appellant of a certificate of non-appearance in Form 12 as required mandatorily under O 13 r 7(1)(a) of the ROC 2012; and (b) the appellant's claim fell under 'other claims' pursuant to O 13 r 6 of the ROC 2012 and this provision expressly precluded the entry of judgment in default of appearance for such claims. Subsequently, if the eighth respondent failed to file defence, the appellant ought to invoke O 19 r 7 (judgment in default of defence) but the appellant failed to do so and this constituted a fundamental procedural defect that could not be overlooked. For the above reasons, the court found no error in the JC's approach and affirmed her decision to refuse judgment against the eighth respondent (see paras 113–119 & 123).

(11) With respect to the appellant's alternative argument, the court found that: (a) the fact that actual expenditure exceeded initial estimates did not automatically constitute breach of duty, particularly where the variations occurred in response to evolving business circumstances; (b) the failure to achieve recovery did not constitute breach of directors' duties where the failure resulted from factors beyond the directors' reasonable control; and (c) the appellant's allegation regarding the transfer of equipment to Iris Tech UK worth £168,538.34 was not established to constitute breaches of duty by the respondents because such action was operational matter within management's authority rather than Board-level decisions requiring specific director's approval (see paras 128 & 130–131).

(12) The law on appellate intervention to findings of fact was well-settled. An appellate court did not interfere with the trial judge's conclusions on primary facts unless it was satisfied that the trial judge was 'plainly wrong'. The 'plainly wrong' test essentially meant that an appellate court would only interfere with a lower court's decision if it was so clearly wrong that no reasonable judge could have reached that conclusion based on the evidence presented. Applying the 'plainly wrong' test, it was the court's view that the learned JC had properly considered all relevant evidence. She did not make any significant errors in interpreting the law or reach conclusions that were not supported by the facts on the record (see paras 133–134 & 137).

[Bahasa Malaysia summary

Iris Corp Bhd ('perayu') telah menyaman responden-responden atas dakwaan pelanggaran kewajipan pengarah berhubung satu pelaburan yang gagal dalam Border Control Solution Ltd ('Pelaburan BCS'), sebuah syarikat United Kingdom ('tuntutan perayu'). Secara khususnya, perayu mendakwa bahawa responden-responden telah melanggar kewajipan fidusiari, kewajipan untuk bertindak dengan suci hati, kewajipan ketelitian dan kemahiran, dan pelbagai kewajipan berkanun di bawah Akta Syarikat 2016 ('Akta 777'). Selain itu, terhadap responden kedua sebagai Ketua Pegawai Eksekutif ('CEO') dan pengarah urusan ('MD'), tuntutan perayu adalah berkaitan dengan pelantikan Joseph Vijay Kumar ('JVK') sebagai perunding dan pembayaran berkaitan yang dibuat kepada JVK. Perayu menuntut ganti rugi kira-kira RM11.7 juta yang mewakili jumlah keseluruhan yang dilaburkan dan dibayar kepada BCS dan pemegang saham tunggalnya, JVK. Bagi menyokong kesnya, perayu bergantung pada laporan siasatan oleh Ernst & Young Services Sdn Bhd ('siasatan EY') yang menyatakan bahawa terdapat penyelewengan berkaitan dengan pelaburan BCS tersebut dan terdapat potensi pelanggaran kewajipan pengarah. Responden-responden sebaliknya bergantung pada laporan siasatan yang lebih awal yang dibuat oleh Ferrier Hodgson MH Sdn Bhd ('laporan FH') yang menyatakan bahawa tiada penyelewengan dalam Pelaburan BCS dan pelaburan tersebut 'dipertimbangkan dan diluluskan secara komersial'. Pada akhir prosiding, pesuruhjaya kehakiman yang bijaksana ('PK') menolak tuntutan perayu berdasarkan dapatan-dapatan berikut: (a) responden-responden adalah saksi-saksi yang boleh dipercayai dan keterangan mereka menunjukkan keputusan kolektif untuk membuat Pelaburan BCS tersebut dan keputusan tersebut telah dicapai dengan jujur, bona fide dan demi kepentingan terbaik syarikat secara keseluruhan dan tidak dilaksanakan untuk tujuan yang tidak wajar; (b) keputusan responden-responden tersebut, dalam keadaan yang wujud semasa Resolusi Pekeliling Pengarah ('RPP') ditandatangani oleh semua responden untuk meluluskan Pelaburan BCS tersebut, termasuk dalam kaedah pertimbangan perniagaan berkanun; (c) terdapat keterangan material bahawa responden-responden mempunyai pengetahuan awal yang substansial tentang projek penswastaan imigresen UK melalui pelbagai cara termasuk mesyuarat peribadi, lawatan pejabat dan kesedaran Lembaga Pengarah tentang keinginan perayu untuk turut serta; (d) PK memilih laporan FH berbanding siasatan EY kerana siasatan mendalam tidak dijalankan oleh EY dan keterangan PW6 (wakil EY) tidak meyakinkan dan harus ditangani dengan berhati-hati; dan (e) tarikh menandatangani RPP tersebut adalah tidak material. Terkilan dengan keputusan PK, perayu memfailkan rayuan semasa.

Diputuskan, menolak rayuan dengan kos, dan mengesahkan keputusan PK:

(1) Mahkamah bersetuju dengan analisis PK bahawa: (a) kaedah pertimbangan perniagaan berkanun dalam s 214 Akta 777 merangkumi

kaedah pertimbangan perniagaan 'common law' seperti yang dinyatakan dalam *Howard Smith Ltd v Ampol Ltd* [1974] AC 821; (b) undang-undang yang akan diguna pakai ialah Akta 777 kerana saman semasa difailkan selepas Akta 777 berkuat kuasa; dan (c) berdasarkan keterangan, empat keperluan kumulatif di bawah s 214(1) Akta 777 yang berikut telah dipenuhi: (i) responden-responden membuat pertimbangan perniagaan tersebut dengan suci hati bagi maksud yang sepatutnya; (ii) responden-responden tidak mempunyai kepentingan persendirian yang material dalam hal perkara pertimbangan perniagaan tersebut; (iii) responden-responden dimaklumkan tentang hal perkara pertimbangan perniagaan tersebut setakat yang responden-responden semunasabahnya mempercayai sebagai sesuai di bawah hal keadaan tersebut — dalam hal ini, terdapat keterangan material bahawa responden-responden mempunyai pengetahuan awal yang substansial tentang projek penswastaan imigresen UK melalui pelbagai cara; dan (iv)responden-responden semunasabahnya mempercayai bahawa pertimbangan perniagaan tersebut adalah demi kepentingan syarikat (lihat perenggan 29 & 32–46).

(2) Berkenaan dengan keperluan 'penilaian bebas' di bawah s 215(2)(b) Akta 777, keputusan Mahkamah Tinggi bahawa responden-responden menjalankan penilaian bebas berdasarkan taklimat mereka, apabila dilihat berdasarkan pengetahuan awal dan pengalaman Lembaga Pengarah yang luas, adalah munasabah. Penilaian bebas tidak mewajibkan usaha wajar yang komprehensif atau siasatan skeptikal, tetapi sebaliknya memerlukan analisis yang tidak berat sebelah ke atas maklumat yang diberikan, dengan mengambil kira pengetahuan pengarah tentang syarikat dan kerumitan operasinya (lihat perenggan 48 & 50).

(3) Kaedah pertimbangan perniagaan wujud, sebahagiannya, untuk melindungi para pengarah daripada penggunaan 'hindsight bias' yang tidak adil dalam semakan kehakiman terhadap keputusan mereka. Prinsip perlindungan ini adalah penting untuk mengekalkan persekitaran di mana individu yang berkelayakan akan berkhidmat sebagai pengarah dan di mana pengambilan risiko perniagaan yang sah digalakkan dan bukannya dihukum melalui penelitian kehakiman retrospektif. Sehubungan itu, mahkamah mendapati bahawa keputusan Pelaburan BCS tersebut dibuat hanya dalam tempoh masa maklumat dan keadaan yang tersedia kepada responden-responden pada masa yang material, tanpa merujuk kepada perkembangan atau maklumat berikutnya yang hanya tersedia selepas keputusan pelaburan dibuat termasuk keterangan PW6 yang memberikan pendapatnya tentang apa yang sepatutnya dilakukan untuk melindungi kepentingan perayu dalam Pelaburan BCS tersebut (lihat perenggan 58 & 64–65).

(4) Pesuruhjaya kehakiman adalah betul sepenuhnya dalam memilih laporan FH, yang menyimpulkan bahawa Pelaburan BCS tersebut telah 'dipertimbangkan dan diluluskan secara komersial' dengan 'tiada penyelewengan diperhatikan', berbanding siasatan EY yang tidak lengkap dan berpotensi berat sebelah atas sebab-sebab berikut: (a) kekurangan dalam siasatan EY — dalam hal ini, EY hanya menyelesaikan Fasa 1 daripada siasatan yang sepatutnya melibatkan dua fasa, dan EY juga gagal menjalankan temu bual dengan pengarah-pengarah berkaitan yang telah membuat keputusan pelaburan tersebut; (b) PW6 bukanlah saksi yang boleh dipercayai; dan (c) laporan FH terbukti lebih boleh dipercayai daripada siasatan EY kerana: (i) laporan FH dijalankan lebih dekat dengan masa peristiwa yang berkaitan; (ii) skop laporan FH adalah lebih luas daripada Fasa 1 siasatan EY; dan (iii) laporan FH telah dicetuskan oleh Lembaga Pengarah perayu yang asal, termasuk pengarah-pengarah yang terlibat dalam keputusan Pelaburan BCS tersebut (lihat perenggan 66–74).

(5) Mahkamah berpuas hati bahawa PK telah membebaskan responden kedua daripada liabiliti dengan betul. Pesuruhjaya kehakiman telah menggunakan kaedah pertimbangan perniagaan dengan betul untuk melindungi keputusan responden kedua. Mahkamah bersetuju dengan PK bahawa tindakan responden kedua dalam melantik JVK sebagai perunding termasuk dalam kuasanya sebagai MD dan dilindungi oleh kaedah pertimbangan perniagaan. Tambahan pula, bayaran perundingan tersebut adalah munasabah dari segi jumlah dan kekerapan, mencerminkan nilai perkhidmatan JVK. Tiada juga keterangan bahawa responden kedua memperoleh manfaat kewangan peribadi daripada BCS Investment atau pelantikan JVK. Keputusannya nampaknya didorong oleh penilaian manfaat syarikat dan bukannya keuntungan persendirian (lihat perenggan 76–77, 79, 81 & 83).

(6) Pesuruhjaya kehakiman yang bijaksana dengan tepat menyedari bahawa tarikh menandatangani RPP yang tepat tidak penting kepada isu undang-undang yang utama. Tidak kira sama ada pengarah menandatangani pada 6 Januari 2016 atau 23 Februari 2016, persoalan utama kekal iaitu sama ada mereka bertindak dengan ketelitian, dengan suci hati dan demi kepentingan syarikat berdasarkan maklumat yang tersedia kepada mereka. Keterangan menunjukkan bahawa tanpa mengira tarikh menandatangani RPP tersebut, responden-responden mempunyai pengetahuan awal yang substansial tentang projek BCS tersebut dan menerima taklimat yang sesuai sebelum membuat keputusan mereka. Masa dokumentasi tidak menjejaskan inti pati proses membuat keputusan mereka atau perlindungan yang diberikan oleh kaedah pertimbangan perniagaan (lihat perenggan 89–90).

(7) Mahkamah Persekutuan dalam kes *Tengku Dato' Ibrahim Petra bin*

Tengku Indra Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177 ('Petra Perdana') dengan jelas menetapkan bahawa ujian pelanggaran kewajipan menggabungkan kedua-dua elemen subjektif dan objektif. Ujian tersebut adalah subjektif dalam menilai keadaan fikiran pengarah dan sama ada pengarah benar-benar mempertimbangkan pelaksanaan budi bicara adalah demi kepentingan terbaik syarikat. Ujian tersebut adalah objektif kerana penilaian pengarah tertakluk kepada semakan objektif oleh mahkamah. Elemen objektif tersebut menghendaki mahkamah menilai sama ada 'seorang yang bijak dan jujur dalam jawatan pengarah syarikat berkenaan boleh, dalam keseluruhan keadaan sedia ada, secara munasabah mempercayai bahawa transaksi tersebut adalah untuk kepentingan syarikat'. (lihat perenggan 97–99).

(8) Dengan mengaplikasikan ujian ini kepada fakta kes semasa, faktor-faktor berikut menyokong kesimpulan bahawa pengarah-pengarah yang munasabah dalam kedudukan responden-responden benar-benar boleh mempercayai bahawa Pelaburan BCS tersebut akan memberi manfaat kepada syarikat: (a) pelaburan tersebut memanfaatkan kepakaran teras syarikat dalam teknologi pengenalan yang dipercayai, bidang di mana ia telah menunjukkan keupayaan terkemuka di dunia selama dua dekad; (b) penswastaan 'UK Border Force' menunjukkan k ontrak kerajaan yang besar dengan potensi pendapatan yang ketara; (c) syarikat telah melabur sumber dalam projek tersebut melalui peminjaman kakitangan dan pembangunan cadangan, yang menunjukkan penilaian positif pihak pengurusan terhadap daya majunya; (d) responden-responden membawa pengalaman Lembaga Pengarah yang luas dan pengetahuan mendalam tentang perniagaan syarikat kepada penilaian mereka; dan (e) mereka menerima taklimat daripada pihak pengurusan yang berpengalaman dengan kepakaran khusus dalam teknologi yang berkaitan. Oleh itu, kesimpulan PK bahawa kepercayaan responden-responden adalah munasabah secara objektif adalah berasas dan selaras dengan piawaian Petra Perdana (lihat perenggan 100–102).

(9) Seksyen 581 Akta 777 memberi kuasa kepada mahkamah untuk melepaskan pengarah daripada liabiliti jika mereka telah bertindak dengan jujur dan munasabah dan mereka patut dikecualikan secara saksama daripada liabiliti. Keterangan membuktikan bahawa responden-responden bertindak dengan jujur sepanjang tempoh yang berkaitan, mempercayai bahawa keputusan mereka akan memberi manfaat kepada syarikat. Tindakan mereka juga munasabah memandangkan pengetahuan mereka tentang perniagaan syarikat, pengalaman mereka dalam industri, dan maklumat yang ada mengenai projek BCS tersebut. Oleh itu, PK tidak terkhilaf dalam mengguna pakai s 581 Akta 777 (lihat perenggan 107–108 & 111).

(10) Berhubung dengan kegagalan responden kelapan untuk hadir semasa

perbicaraan atau memberi keterangan, walaupun perayu telah memetik dengan betul A 35 k 1(2) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') yang membenarkan mahkamah meneruskan perbicaraan tanpa kehadiran pihak tertentu, peruntukan umum ini tidak mengatasi keperluan prosedur khusus untuk mendapatkan penghakiman ingkar. Mahkamah bersetuju dengan dapatan-dapatan PK bahawa: (a) beliau tidak mempunyai kebebasan untuk menepikan pengemukaan perakuan ketidakhadiran oleh perayu dalam Borang 12 seperti yang dikehendaki secara mandatori di bawah A 13 k 7(1)(a) KKM 2012; dan (b) tuntutan perayu termasuk di bawah 'tuntutan lain' menurut A 13 k 6 KKM 2012 dan peruntukan ini secara nyata menghalang kemasukan penghakiman atas keingkaran kehadiran untuk tuntutan tersebut. Seterusnya, jika responden kelapan gagal memfailkan pembelaan, perayu sepatutnya menggunakan A 19 k 7 (penghakiman ingkar pembelaan) tetapi perayu gagal berbuat demikian dan ini merupakan kecacatan prosedur asas yang tidak boleh diabaikan. Atas sebab-sebab di atas, mahkamah tidak menemui apa-apa kekhilafan dalam pendekatan PK dan mengesahkan keputusannya untuk menolak penghakiman terhadap responden kelapan (lihat perenggan 113–119 & 123).

(11) Berkenaan dengan hujah alternatif perayu, mahkamah mendapati bahawa: (a) hakikat bahawa perbelanjaan sebenar melebihi anggaran awal tidak secara automatik merupakan pelanggaran kewajipan, terutamanya jika variasi berlaku sebagai tindak balas kepada keadaan perniagaan yang berubah-ubah; (b) kegagalan untuk mendapatkan semula wang tidak berjumlah kepada pelanggaran kewajipan pengarah jika kegagalan tersebut berpunca daripada faktor di luar kawalan munasabah pengarah; dan (c) dakwaan perayu mengenai pemindahan peralatan kepada Iris Tech UK bernilai £168,538.34 tidak dibuktikan sebagai pelanggaran kewajipan oleh responden-responden kerana tindakan sedemikian adalah perkara operasi di bawah kuasa pengurusan dan bukannya keputusan peringkat Lembaga yang memerlukan kelulusan tertentu oleh pengarah (lihat perenggan 128 & 130–131).

(12) Undang-undang mengenai campur tangan rayuan terhadap dapatan fakta telah dimuktamadkan. Mahkamah rayuan tidak mengganggu kesimpulan hakim bicara mengenai fakta utama melainkan ia berpuas hati bahawa hakim bicara 'jelas salah'. Ujian 'jelas salah' pada asasnya bermaksud bahawa mahkamah rayuan hanya akan mengganggu keputusan mahkamah rendah jika ia jelas salah sehingga tiada hakim yang munasabah dapat mencapai kesimpulan tersebut berdasarkan keterangan yang dikemukakan. Dengan mengguna pakai ujian 'jelas salah', mahkamah berpendapat bahawa PK yang bijaksana telah mempertimbangkan semua keterangan yang berkaitan dengan sewajarnya. Beliau tidak membuat apa-apa kekhilafan yang ketara dalam mentafsir undang-undang atau telah mencapai kesimpulan yang tidak

A disokong oleh fakta dalam rekod (lihat perenggan 133–134 & 137).]

Cases referred to

Charterbridge Corpn Ltd v Lloyds Bank Ltd and another [1970] Ch 62, Ch D (folld)

B *Goh Chan Peng and Others v Beyonics Technology Ltd and another and another appeal* [2017] SCD 205; [2017] 2 SLR 592; [2017] SGCA 40, CA (refd)

Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821, PC (refd)

Kam Thai Eng Linda & Anor v Tan Sri Dato' Kam Woon Wah & Ors [2023] 1 MLJ 765, CA (refd)

C *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, SC (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67, FC (folld)

Peoples Department Stores Inc (Trustee of) v Wise [2004] 3 SCJ No 64, SC (refd)

D *Petra Perdana Bhd v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors* [2014] 11 MLJ 1, HC (folld)

Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals [2012] 3 MLJ 616; [2012] 5 CLJ 169, CA (refd)

Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228, PC (refd)

E *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177, FC (refd)

Vita Health Laboratories Pte Ltd v Pang Seng Meng [2004] SCD 190; [2004] 4 SLR 162, HC (refd)

F **Legislation referred to**

Companies Act 1965 (repealed by Companies Act 2016) ss 132(1), (1A), (1B), 354

Companies Act 2016 ss 213(1), (2), 214, 214(1), (1)(a), (1)(b), (1)(c), (1)(d), 215, 215(2)(b), 581

G Rules of Court 2012 O 13, O 13 rr 1, 6, 7(1)(a), O 19, O 19 r 7, O 35 r 1(2)

Appeal from: *Iris Corporation Bhd v Tan Sri Razali bin Ismail & Ors* [2022] MLJU 2756 (High Court, Kuala Lumpur)

H *Siew Yew Ming (with Chan Mun Fei and Ng Seng Yi) (Raja Eleena Siew Ang & Assoc) for the appellant.*

Ivanpal Singh Grewal (with Keshvinder Kaur a/p Harvinder Singh) (AJ Ariffin, Yeo & Harpal) for the first respondent.

Mohd Rizal Bahari (with Mohd Amirfarid Mohd Nawawi) (Bahari & Bahari) for the second respondent.

I *Elisabeth Lye (Zainal Abidin & Co) for the third respondent.*

Mohamad Nufail Altaf bin Mohd Zaim Munir (Raja Riza & Assoc) for the fourth respondent.

Andrew Chiew Ean Vooi (with Andrew Chang Weng Shan and Komal Kaur

Dhaliwal) (Lee Hishammuddin Allen & Gledhill) for the fifth, sixth, seventh and ninth respondents.

Ahmad Fairuz JCA:

INTRODUCTION

[1] This appeal arises from the decision of the learned judicial commissioner delivered on 18 August 2022, dismissing the appellant's claims against all nine respondents for alleged breaches of directors' duties in relation to an investment in Border Control Solutions Ltd ('BCS'), a United Kingdom company. The appellant sought damages of approximately RM11.7m (equivalent to £2.05m) representing the total amount invested in and paid to BCS and its sole shareholder, Joseph Vijay Kumar ('JVK').

[2] Having heard comprehensive submissions from all parties and carefully considered the evidence and the High Court's reasoning, we dismiss the appeal with costs. The learned judicial commissioner's analysis was legally sound, factually well-grounded, and her conclusions were amply supported by the evidence before her.

BACKGROUND FACTS

[3] The appellant, Iris Corp Bhd, is a public listed company that has established itself as a pioneer in trusted identification technology. The company was the inventor of the world's first electronic passport and multi-application electronic identification system, effectively revolutionising the trusted identification industry. For over two decades, trusted identification remained the appellant's core business and primary revenue generator.

[4] The respondents were directors of the appellant at the material time, serving in various capacities. The first respondent was Chairman from May 2015 to August 2017. The second respondent was Chief Executive Officer and Managing Director from August 2013 to October 2017, having been one of the company's founders. The remaining respondents served as executive and non-executive directors with varying tenures, most having extensive experience on the appellant's Board spanning several years.

[5] The BCS Investment arose from an opportunity to participate in the privatisation of the United Kingdom Border Force. BCS was incorporated in April 2015 as a special purpose vehicle to pursue this privatisation opportunity, with JVK as its sole shareholder and director until September 2016. The privatisation proposal required sophisticated trusted identification technology

for immigration control purposes, falling squarely within the appellant's area of expertise.

[6] The appellant's involvement with the BCS project began in 2015, when the second respondent travelled to London and was introduced to JVK and other participants in the project. The appellant's senior staff, including Dr Gavin Hoh and Cheah Chin Hwa, were subsequently seconded to BCS to assist in developing the privatisation proposal. Equipment was also shipped and supplied to Iris Tech UK Ltd, a subsidiary incorporated for the project.

[7] On 6 January 2016, BCS made a formal offer to the appellant to subscribe for 10% of BCS shares for £2m. The appellant's Board approved this investment through a Directors' Circular Resolution ('DCR') dated 6 January 2016, though there was dispute at trial about when various directors actually signed the DCR.

[8] Between January and August 2016, the appellant made payments totalling £2.05m in relation to the BCS Investment. These payments were made both to BCS directly and to JVK personally, the latter pursuant to consultancy agreements entered into between the appellant and JVK.

[9] By October 2016, concerns had emerged about the viability of the investment. On 5 October 2016, the appellant's Board resolved to withdraw from the BCS Investment, with the second respondent undertaking to procure a refund by 31 December 2016. Despite these efforts, no refund was obtained. BCS was subsequently wound up by order of the High Court of the United Kingdom on 31 January 2018.

THE INVESTIGATIVE REPORTS

[10] Two significant investigative reports were commissioned in relation to the BCS Investment. On 30 May 2017, the appellant's Board engaged Ferrier Hodgson MH Sdn Bhd ('FH') to conduct a review of various projects undertaken by the appellant, including the BCS Investment. In its report dated 28 July 2017, FH stated that there were no irregularities observed in the BCS Investment and that the investment was 'commercially considered and approved'.

[11] Subsequently, on 20 February 2018, after Caprice Development had become a substantial shareholder in July 2017, the appellant commissioned Ernst & Young Services Sdn Bhd ('EY') to conduct a forensic investigation. EY produced a draft preliminary report on 16 July 2018, finalised on 19 April 2019. The EY report identified what it characterised as irregularities in relation to the BCS Investment and suggested potential breaches of directors' duties.

[12] The divergent conclusions of these two reports became a central issue in the proceedings, with the appellant relying heavily on the EY findings to support its case against the respondents.

THE HIGH COURT PROCEEDINGS

[13] On 24 April 2019, the appellant commenced proceedings against the respondents, alleging breaches of fiduciary duties, duties to act in good faith, duties of care and skill, and various statutory duties under the Companies Act 2016. The appellant's case was founded primarily on the EY report's findings and contentions that the respondents had approved the BCS Investment without adequate information, due diligence, or independent assessment.

[14] The learned judicial commissioner dismissed the appellant's claims against all respondents, finding that they had not breached their duties and were protected by the business judgment rule under ss 214 and 215 of the Companies Act 2016. She found the respondents to be credible witnesses who had acted honestly, in good faith, and in the best interests of the company.

THE APPELLANT'S MAIN CONTENTIONS

[15] The appellant's case rested on several principal contentions, which may be summarised as follows:

Breach of independent assessment requirement

[16] The appellant contended that the respondents failed to satisfy the requirement under s 215(2)(b) of the Companies Act 2016 to make an 'independent assessment' of the information provided before approving the BCS Investment. The appellant argued that the respondents relied entirely on representations from the second respondent and Dr Gavin Hoh without conducting proper due diligence or seeking independent verification of the information presented.

Inadequate information for decision-making

[17] The appellant submitted that the respondents were not adequately informed about the subject matter of the business judgment as required by s 214(1)(c) of the Companies Act 2016. Specifically, the appellant contended that the respondents lacked crucial information about BCS's financial position, corporate structure, business plan and the terms of the privatisation opportunity.

Reliance on EY report findings

[18] Central to the appellant's case was its reliance on the EY forensic investigation report, which identified various alleged irregularities including absence of sufficient evidence to support BCS's representations, dubious structural arrangements, lack of proper share registration and inadequate Board deliberation. The appellant argued that these findings demonstrated clear breaches of directors' duties.

Rejection of Ferrier Hodgson report

[19] The appellant sought to distinguish and minimise the significance of the earlier FH report, arguing that it was merely an audit report rather than a forensic investigation specifically focused on directors' duties. The appellant contended that the High Court erred in giving greater weight to the FH report over the more comprehensive EY investigation.

Failure to apply objective test

[20] The appellant argued that the High Court failed to apply the objective limb of the test established in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177, contending that the learned judicial commissioner focused solely on the directors' subjective good faith without conducting proper objective review of whether their decisions were reasonable.

Dating and timing issues

[21] The appellant challenged the High Court's finding that the date of signing the DCR was immaterial, arguing that this was critical to determining the legality and propriety of payments made on 11 January 2016. The appellant contended that if the DCR was signed on 23 February 2016, it would have exceeded the validity period for accepting the first BCS offer.

THE RESPONDENTS' MAIN CONTENTIONS

[22] The respondents advanced several lines of defence, which may be summarised as follows:

Business judgment rule protection

[23] The respondents contended that their approval of the BCS Investment was protected by the business judgment rule under s 214 of the Companies Act 2016. They argued that they had satisfied all four requirements: acting for proper purposes and in good faith, having no material personal interest, being adequately informed and reasonably believing the decision was in the company's best interest.

Prior knowledge and experience

[24] The respondents emphasised their extensive prior knowledge of the BCS project and their accumulated expertise in the trusted identification industry. They argued that this background knowledge, combined with briefings received from management, provided an adequate foundation for their decision-making.

Entitlement to rely on management

[25] Under s 215 of the Companies Act 2016, the respondents contended they were entitled to rely on information provided by the second respondent (as CEO and Managing Director) and Dr Gavin Hoh (as Executive Director with relevant expertise), both of whom they reasonably believed to be reliable and competent.

Criticism of EY investigation

[26] The respondents mounted a comprehensive challenge to the reliability and completeness of the EY investigation, highlighting that only Phase 1 had been completed, no interviews were conducted with the respondents themselves and the investigation was conducted with complete hindsight knowledge of the investment's failure.

Support from FH Report

[27] The respondents relied on the earlier FH report's conclusion that the BCS Investment was 'commercially considered and approved' with no irregularities observed. They argued that this contemporaneous assessment by independent professionals supported the propriety of their decision-making process.

THE HIGH COURT'S DECISION

[28] The learned judicial commissioner delivered a comprehensive judgment addressing all the key issues raised by the parties. Her principal findings may be summarised as follows:

(a) credibility of witnesses: in para [64] of her judgment, she found that 'the defendants were credible witnesses' and that their evidence 'pointed to a collective decision to make the BCS Investment' that was 'taken by the defendants honestly arrived at, bona fide and in the best interests of the company as a whole and not exercised for an improper purpose';

(b) application of business judgment rule: in paras [34], she concluded that the decision 'in the circumstances that existed when the DCR was signed

by all defendants to affect the BCS Investment, appears to me to fall within the statutory business judgment rule';

(c) prior knowledge: in paras [20.1] and [20.2], she found material evidence that the respondents had substantial prior knowledge of the UK immigration privatisation project through various means including personal meetings, office visits and Board awareness of the appellant's intended participation;

(d) treatment of expert evidence: the learned judicial commissioner preferred the FH report over the EY investigation, noting In paras [35] that 'EY's job was not completed — the in-depth investigation was not carried out' and that 'PW-6's evidence with respect, is unconvincing and to be treated with caution.'; and

(e) DCR dating issue: in paras [12], she held that 'the date they each signed is not of central importance' and agreed with the appellant that 'the date they signed not material'.

ANALYSIS

Application of the business judgment rule

[29] We agree with the analysis of the judicial commissioner when she held that the statutory business judgment rule in s 214 of the Companies Act 2016 encapsulates the common law business judgment rule as set out in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821. In that case there was a challenge to the validity of an issue of shares by the directors of a company. The court had to decide whether the said directors had been motivated by any purpose or personal gain or advantage or whether they had acted bona fide in the interests of the company. The judge found that the primary purpose of the allotment was to proportionately reduce the shareholdings of certain majority shareholders such that a take-over could be facilitated by another entity. It was found in those circumstances that the directors had improperly exercised their powers. The matter proceeded to the Privy Council where the Judicial Committee found, dismissing the appeal that, although the directors had acted honestly and had power to make the allotment, to alter a majority shareholding was to interfere with an element of the company's constitution which was separate from the directors' powers and accordingly, it was unconstitutional for the directors to use their fiduciary powers over the shares in the company for the purpose of destroying an existing majority or creating a new majority. Since the directors' primary object for the allotment of shares was to alter the majority shareholding, the directors had improperly exercised their powers and the allotment was invalid.

[30] In so holding the Judicial Committee commented, inter alia, in relation

to the business judgment rule, as follows:

> ... In order to assist him in deciding upon the alternative motivations contended for, the judge considered first at some length, the objective question whether Millers was in fact in need of capital. This approach was criticised before their Lordships: it was argued that what mattered was not the actual financial condition of Millers, but what the majority directors bona fide considered that condition to be. *Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at*.
>
> But accepting all of this, when a dispute arises whether directors of a company made a particular decision for one purpose or another, or whether there being more than one purpose, one or other purpose was the substantial or primary purpose, the court, in their Lordships' opinion, is entitled to look at the situation objectively in order to estimate how critical or pressing or substantial or, per contra, insubstantial an alleged requirement might have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount the assertions of individuals that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme.

[31] In *Petra Perdana Bhd v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors* [2014] 11 MLJ 1 Nallini Pathmanathan J (now FCJ) explained the business judgment rule as follows:

> [364] Business judgment has been defined to mean 'any decision on whether or not to take action in respect of a matter relevant to the business of the company' (see s 132 of the Companies Act). In *Australian Securities and Investments Commission v Rich* (2009) 75 ACSR 1 Austin J accepted a wide interpretation of the scope of 'business judgment'. The words 'in respect of, 'matter' and 'relevant' were accorded considerable breadth. As such it follows that an issue such as a shortage of cash flow and the disposal of assets falls squarely within this definition.
>
> [365] The effect of the statutory business judgment rule in the current context is this: If the impugned directors can show that they made the decisions to affect the second and third divestments, as a business judgment within the scope of s 132(1 B) of the Companies Act 1965, then they are deemed to have met their obligations and duties as directors under statute, common law and equity. In other words, the requirements of s 132(1A) of due care and diligence in the exercise of their duties would have been met.
>
> [366] How then is this to be ascertained? The courts do not undertake the exercise of assessing the merits of a commercial or business judgment (see *Smith (Howard) Ltd v Ampol Petroleum Ltd* [1974] AC 821).
>
> [367] In the Australian case of *Australian Securities and Investments Commission v Rich* [2009] ACSR 1 ('the *Rich* case') the enquiry related to the managing director

Rich and the finance director, Silberman's failure to advise the board of directors that the company was insolvent. It should be highlighted that the statutory Australian provision equivalent to s 132(1B) is similar to our provision save for the use of the words 'rationally believes' rather than 'reasonably believes' in our section. While it has been argued by the American Law Institute that 'rationally believe' is considerably wider than 'reasonably believe' I am unable to subscribe entirely to that construction. Rational by definition alludes to a decision based on reason or logic. Reasonable as a word has much the same effect, namely a decision premised on logic or sense. The distinction does not therefore appear to be as wide as is suggested.

[368] *In the Rich case, Austin J. set out a compendium of requirements that need to be satisfied in or order to satisfy this requirement of 'rational' belief. As 'rational' is not entirely dissimilar to 'reasonable' it appears that the criteria set out in Rich's case are applicable under s 132(1B)*. Austin J held there that reasonableness should be assessed by reference to:

(a) the *importance* of the business judgment that is to be made;

(b) the *time available* for obtaining information;

(c) the *costs* related to obtaining information;

(d) the *director's confidence* in exploring the matter;

(e) the *state of the company's business at that time* and the nature of the competing demands on the board's attention; and

(f) *whether or not the information is available* to the director

[370] Reference was made to *Maple Leaf Foods Inc v Schenieder Corp* (1998) 42 OR (3d) 177:

> *The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a reasonable decision not a perfect decision. Provided that the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision. This formulation of deference to the decision of the Board is known as the 'Business judgment rule'. The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction*. (Emphasis added.)

THE APPLICABLE LAW

[32] We accept the analysis by the judicial commissioner on the applicable law where she held 'Although the alleged cause of action took place in 2016, the Companies Act 2016 ('the CA 2016') came into effect on 31 January 2017. The law to be applied is the CA 2016 as the suit was filed after the CA 2016 became effective — see *Kam Thai Eng Linda & Anor v Tan Sri Dato' Kam Woon*

Wah & Ors [2023] 1 MLJ 765. At any rate, this will not make any earth-shaking difference as ss 132(1), (1A) and (1B) of the Companies Act 1965 ('the CA 1965') has been re-enacted as ss 213(1), (2) and 214 of the CA 2016; s 354 of the CA 1965 is in pari materia with s 581 of the CA 2016. This will become relevant when considering the cases decided under ss 132(1), (1A) and (1B) of the CA 1965 such as *Petra Perdana Bhd v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors* [2014] 11 MLJ 1; *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616; [2012] 5 CLJ 169 (CA); *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177 (FC).

[33] Section 214 of the Companies Act 2016 reads as follows:

> 214 Business judgement rule
>
> (1) A director who makes a business judgment is deemed to meet the requirements of the duty under subsection 213(2) and the equivalent duties under the common law and in equity if the director —
>
> (a) makes the business judgment for a proper purpose and in good faith;
>
> (b) does not have a material personal interest in the subject matter of the business judgment;
>
> (c) is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and
>
> (d) reasonably believes that the business judgment is in the best interest of the company.
>
> (2) For the purposes of this section, 'business judgment' means any decision on whether or not to take action in respect of a matter relevant to the company's business.

[34] It is our view that the learned judicial commissioner properly applied the four cumulative requirements under s 214(1) of the Companies Act 2016. We agree with her analysis that each requirement was satisfied on the evidence before her.

Proper purpose and good faith — s 214(1)(a)

[35] The High Court's finding in paras [64] that 'a decision taken by the defendants honestly arrived at, bona fide and in the best interests of the company as a whole and not exercised for an improper purpose' was amply supported by the evidence. The learned judicial commissioner assessed the credibility of the witnesses and found the respondents to be credible, noting that while there were minor discrepancies in their evidence, these did not detract from the overall finding of honest decision-making.

[36] The evidence established that the respondents were motivated by their assessment of what would benefit the company rather than any desire for personal gain. Their long service on the Board and continued involvement even during the company's subsequent financial difficulties supported the inference that they were genuinely motivated by the company's interests.

Absence of material personal interest — s 214(1)(b)

[37] There was no evidence suggesting that any respondent had a personal financial stake in the BCS Investment. The investment was within the appellant's core business, and the respondents stood to gain no personal advantage from the decision. This requirement was clearly satisfied.

Adequately informed — s 214(1)(c)

[38] The High Court's findings established that the respondents had substantial prior knowledge of the UK immigration privatisation project through various means including personal meetings, office visits and Board awareness of the appellant's intended participation. The briefing provided on 23 February 2016, viewed against this background knowledge, was sufficient to satisfy this requirement.

[39] The respondents were not making decisions in a vacuum but drawing upon their accumulated knowledge of the company's business and the specific project. Given their expertise and experience, they had reasonable grounds to believe they possessed adequate information to assess the investment's merits.

Best interest of the company — s 214(1)(d)

[40] It is appropriate to mention that what is in the best interest of the company is dependent on the facts of each case. It is never set. In *Corporate Powers Accountability* (3rd Ed), author Loh Swee Chang at p 371 made the following observations:

> There are in theory a wide range of interest for directors to consider and which particular interest in the company's best interest at the time decision making is required is a matter of prioritisation according to the issues confronting the company. In *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Berhad*, the Federal Court recognised that a company's interest may not have the same meaning in all cases. There is bound to be the existence and overlapping of different interest in a given case. Where different interests exist each interest will generally be accorded a different degree of emphasis and it is here that the use of the phase will yield a different meaning. *Wherein lies the interest of the company' in the final analysis, is a question of fact. What the law requires from directors is good faith in their subjective analysis as to where the 'interests of the company' lies but the test is not entirely subjective: Tengku Dato' Ibrahim Petra bin Tengku Indra Petra. There must be*

evidence of independent judgment, discretion and consideration of relevant matters which when taken as a whole, may properly be described as being relevant to the interest of the company: Pioneer Haven.

[41] The best interest of the company warrants detailed examination as it forms the cornerstone of business judgment rule protection. The requirement embodies both subjective and objective elements, as established by the Federal Court in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177. Azahar Mohamed FCJ held as follows:

[165] What then is the true test for breach of duty as a director to act in good faith and in the 'best interest of the company'? The question is whether it is a subjective or objective test to judge whether directors acted in the best interest of the company. It is to this we now turn.

[166] *In our judgment, the correct test combines both subjective and objective tests*. The test is subjective in the sense that the breach of the duty is determined on an assessment of the state of mind of the director; the issue is whether the director (not the court) considers that the exercise of discretion is in the best interest of the company. In this regard, in *Corporate Law* by Hans Tjio, Pearlie Koh and Lee Pey Woan at p 361, the learned authors said that the director's conduct is tested by reference to an essentially subjective barometer. The classic formulation of the subjective element in the test is found, as we have discussed earlier at para 157, in *Re Smith & Fawcett, Limited* in which Lord Greene MR said that 'directors must exercise their discretion bona fide in what they consider — not what a court may consider — is in the interest of the company'. The duty is to act in what the director believes, not what the court believes, to be the best interest of the company.

The subjective nature of the test can be seen in *Regentcrest Plc (in liq) v Cohen* [2001] BCC 494 where Jonathan Parker J said:

> ... the question whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test.

[167] The test is objective in the sense that the director's assessment of the company's best interest is subject to an objective review or examination by the courts. In an article entitled Directors' Duty to Act in the Interests of the Company: Subjective or Objective? [2015] JBL Issue 2, the writers said that courts have introduced objective elements into the duty to act in good faith and in the best interest of the company to address the problem identified by Browen LJ in *Hutton v West Cork Railway Company* (1883) 23 Ch D 654 at p 671 where the learned judge said:

> Bona fides cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational. *The test must be*

what is reasonably incidental to, and within the reasonable scope of carrying on, the business of the company.

[42] In considering the subjective element, the test requires assessment of whether the directors genuinely believed the decision would benefit the company. The High Court's finding that the decision was 'honestly arrived at, bona fide and in the best interests of the company as a whole' addresses this subjective component. It would be wrong for a court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision on such a question, if bona fide arrived at (see *Howard Smith Ltd v Ampol Ltd*).

[43] In considering the objective element, the court must evaluate whether such belief was reasonable in the circumstances. Several factors support the reasonableness of the respondents' belief:

(a) alignment with core business:
The BCS project involved privatisation of the UK Border Force, requiring sophisticated trusted identification technology -precisely the appellant's area of expertise for over two decades. The respondents could reasonably believe that participating in such a high-profile project would enhance reputation, demonstrate capabilities and establish a foothold in the UK government market;

(b) scale of opportunity:
The privatisation represented a substantial government contract with significant revenue potential. While the £2.05m investment was substantial, evidence indicated it was within the company's financial capacity and the risk-reward profile appeared favourable;

(c) Directors' knowledge and assessment:
The reasonableness of belief must be assessed against the respondents' knowledge and available information. Their background knowledge of the project, combined with their expertise in trusted identification technology, enabled them to understand how the investment fitted within the company's strategic framework; and

(d) absence of improper purposes:
The decision was not made for improper purposes or personal benefit. The evidence supported that respondents were genuinely motivated by perceived company interests rather than self-serving conduct.

[44] Crucially, the requirement does not demand successful outcomes or perfect directors' judgment. The test focuses on reasonableness of belief at the time the decision was made, not whether subsequent events vindicated their

judgment. The ultimate failure of the BCS Investment does not retrospectively invalidate the reasonableness of the respondents' belief in February 2016.

[45] The business judgment rule serves important policy objectives in encouraging competent individuals to serve as directors and in promoting legitimate business risk-taking. If directors faced personal liability for every business decision that ultimately proved unsuccessful, qualified individuals would be deterred from serving on company boards and those who did serve would adopt excessively conservative approaches that could stifle business growth and innovation.

[46] The learned judicial commissioner's application of the business judgment rule in this case properly recognised these policy considerations while ensuring that directors who act honestly and in the best interest of the company receive appropriate legal protection.

THE INDEPENDENT ASSESSMENT REQUIREMENT UNDER S 215

[47] Section 215 of the Companies Act 2016 reads as follows:

> 215 Reliance on information provided by others
>
> (1) A director in exercising his duties as a director may rely on information, professional or expert advice, opinions, reports or statements including financial statements and other financial data, prepared, presented or made by —
>
> (a) any officer of the company whom the director believes on reasonable grounds to be reliable and competent on the matters concerned;
>
> (b) as to matters involving skills or expertise, any other person retained by the company in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence;
>
> (c) another director in relation to matters within the director's authority; or
>
> (d) any committee to the board of directors on which the director did not serve in relation to matters within the committee's authority.
>
> (2) The director's reliance made under subsection (1) is deemed to be made on reasonable grounds if it was made —
>
> (a) in good faith; and
>
> (b) after making an independent assessment of the information or advice, opinions, reports or statements, including financial statements and other financial data, having regard to the director's knowledge of the company and the complexity of the structure and operation of the company.

[48] The appellant's primary complaint focused on the alleged failure to conduct 'independent assessment' as required by s 215(2)(b). However, this

A argument misconceives the nature of the requirement. Independent assessment does not mandate comprehensive due diligence or sceptical inquiry, but rather an unbiased analysis of information provided, having regard to the director's knowledge of the company and complexity of its operations.

B **[49]** The respondents possessed substantial knowledge and experience relevant to the BCS Investment. Most had served on the Board for many years and had accumulated considerable understanding of the appellant's business operations and strategic direction. This background knowledge enabled them to place the information presented on 23 February 2016 in proper context and
C constituted the independent assessment required by law.

[50] The High Court's finding that the respondents conducted independent assessment based on their briefing, viewed in light of their prior knowledge and extensive Board experience, was reasonable. The requirement is that assessment
D be 'independent, not that it be comprehensive or conducted from a position of scepticism'.

[51] Given the facts of this case where the nature of the appellant's venture
E into the business of border control utilising its technical know-how leveraging the appellant's past experience in the industry was common knowledge to the respondents, it would not require an assessment that is complex and extensive. It would be a different issue if the venture was outside the realm of the usual business activity of the appellant.

F

[52] The appellant's contention that determining whether the respondents made a reasonable business judgment is purely a question of law for the court is misconceived. While the legal test is indeed for the court to determine, the factual matrix upon which that determination is made necessarily includes
G evidence from witnesses with relevant knowledge and expertise.

[53] The argument of the appellant on this issue is therefore without merits and border on knit picking.

H APPLICATION OF THE BUSINESS JUDGMENT RULE WITHOUT HINDSIGHT BIAS

[54] In evaluating the respondents' decision to approve the BCS Investment, this court is mindful of the principle that business decisions must not be
I assessed with the benefit of hindsight. The dangers of hindsight bias in the evaluation of commercial decisions have been recognised across multiple jurisdictions and form a cornerstone of the business judgment rule.

[55] The Supreme Court of Canada in *Peoples Department Stores Inc (Trustee*

of) v Wise [2004] 3 SCJ No 64 aptly warned against this judicial pitfall at para 64:

> Business decisions must sometimes be made with high stakes and under considerable time pressure in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that becomes available ex post facto. Because of this risk of hindsight bias, Canadian courts have developed a rule of defence to business decisions called the 'business judgment rule'.

[56] Similarly, the Singapore Court of Appeal in *Goh Chan Peng and Others v Beyonics Technology Ltd and another and another appeal* [2017] SCD 205; [2017] 2 SLR 592; [2017] SGCA 40 emphasised judicial restraint in the face of retrospective analysis:

> Thus, a court will be slow to interfere with commercial decisions made honestly but which, on hindsight, were financially detrimental to the company.

[57] Consistent with these authorities, this court is of the respectful view that it ought not to determine the decision by the respondents to undertake the BCS Investment on account of post-facto information. That decision, made in the circumstances that existed when the DCR was signed by all respondents to effect the BCS Investment, appears to this court to fall within the statutory business judgment rule under ss 214 and 215 of the Companies Act 2016.

[58] The 'post-facto information' in this case primarily consisted of the evidence by the appellant's witness, PW6 of EY who rendered her opinion on what should have been done to safeguard the appellant's interest in the BCS Investment. This court rejects this evidence as it is derived from incomplete forensic findings and represents the very type of retrospective analysis that the business judgment rule is designed to prevent.

[59] This court has applied the objective test mandated by the Federal Court in *Petra Perdana*, but crucially, without utilising hindsight as a basis to ascertain whether the respondents acted in accordance with their fiduciary duties or their duty of care as honest and intelligent persons in their position.

[60] It was not a perfect decision on hindsight, but being a business decision taking into account the appellant's core business, the Directors were entitled to have some level of confidence in deciding to approve the BCS Investment, particularly since staff had been seconded since 2015 to the UK and the appellant had assisted in the submission of the proposal to the Home Office.

[61] The respondents were aware of the inherent risk in making the BCS Investment, which depended on the BCS proposal being accepted by the UK

Government, and they acted without the benefit of hindsight. this court has focused on what the respondents believed at the material time rather than what this court might believe years later with the advantage of hindsight to scrutinise with a probing eye the efficacy and reasonableness of information, data or disclosures then provided, which would inevitably affect their sanctity.

[62] Matters which are obvious in retrospect may have been far from clear at the material time. As recognised in *Howard Smith Ltd v Ampol Petroleum Ltd* and affirmed by the Federal Court in *Petra Perdana*, courts should not pass judgment on the merits of business decisions taken in good faith in the boardroom or substitute the board's decision with the court's own, even if on hindsight such decisions may seem incorrect or imprudent.

[63] This court cannot view the respondents' decision to make the BCS Investment with the advantage of hindsight, recognising that they might well have made a different decision with such knowledge. To do so would be overly restrictive and would discourage and kill entrepreneurship. As noted in *Vita Health Laboratories Pte Ltd v Pang Seng Meng* [2004] SCD 190; [2004] 4 SLR 162, directors should not be coerced into exercising defensive commercial judgment, motivated largely by anxiety over legal accountability based on retrospective analysis.

[64] The business judgment rule exists, in part, to protect directors from the unfair application of hindsight bias in judicial review of their decisions. This protective principle is essential to maintaining an environment where qualified individuals will serve as directors and where legitimate business risk-taking is encouraged rather than penalised through retrospective judicial scrutiny.

[65] Accordingly, it is this court's finding that the BCS Investment decision was made strictly within the timeline of the information and circumstances available to the respondents at the material time, without reference to subsequent developments or information that became available only after the investment decision was made.

THE COURT'S ASSESSMENT OF COMPETING EXPERT REPORTS

[66] This court has carefully considered the competing expert reports and finds that the judicial commissioner was entirely correct in preferring the FH report over the EY investigation for the following reasons.

DEFICIENCIES IN THE EY INVESTIGATION

[67] The EY investigation suffered from several deficiencies that rendered it unreliable and incomplete. Most significantly, EY only completed Phase 1 of

what was intended to be a two-phase investigation. Phase 2, which would have investigated 'whether irregularities were done intentionally or whether anyone within the company has benefited from the project,' was never carried out. Without this crucial second phase, EY's conclusions were necessarily preliminary and incomplete.

[68] Further, EY failed to conduct interviews with the relevant directors who had made the investment decision, stating that they 'did not conduct interviews with relevant persons involved as they have all resigned.'. This represented a fundamental methodological flaw, as the assessment of directors' duties necessarily involves consideration of subjective factors such as good faith, state of mind and the reasonableness of beliefs held at the time of decision-making.

CREDIBILITY OF PW6

[69] The credibility of PW6, EY's representative, was seriously undermined by several factors. She admitted that as a forensic auditor, EY was only looking at whether an independent valuation had been carried out but would not be able to comment on the actual valuation as she was not a specialist in border control. She further acknowledged that EY was not in a position to comment on the BCS project as she had not visited the BCS office and had only reviewed potentially incomplete documents.

[70] PW6's reliability as key witness was also called into question after she was confronted with an incorrect statement regarding the FH report. She initially claimed in her witness statement that the FH report's 'findings and observations were not attached with supporting documents such as Board Minutes'. When shown that board minutes were in fact attached to the FH report, she refused to acknowledge her error.

RELIABILITY OF THE FH REPORT

[71] The FH report was demonstrably more reliable than the EY investigation. First, it was conducted much closer in time to the relevant events, being commissioned in May 2017, less than 18 months after the investment decision. This temporal proximity provided better access to contemporaneous records and recollections. Second, as PW6 herself admitted, 'the scope of the FH Report was wider than that of the Phase 1, EY Report'.

[72] Most importantly, the FH report was commissioned by the appellant's original Board, including directors who had been involved in the BCS Investment decision, suggesting that it was motivated by genuine concern about the investment's propriety rather than by subsequent litigation strategy.

[73] The timing of the EY investigation raises serious questions about its motivation and reliability. EY was commissioned in February 2018, after new management had acquired control and after BCS had been wound up. The evidence supports the contention that this investigation was influenced by new management's desire to find fault with previous decisions, particularly given that the previous management 'was not earlier supportive of the entry of Caprice as shareholder'.

[74] For these reasons, this court finds that the judicial commissioner correctly preferred the comprehensive FH report, which concluded that the BCS Investment was 'commercially considered and approved' with 'no irregularities observed' over the incomplete and potentially biased EY investigation. The expert evidence supports the finding that the directors acted properly in approving the BCS Investment.

LIABILITY OF THE SECOND RESPONDENT

The second respondent's unique position and responsibilities

[75] The second respondent occupied a unique position as Chief Executive Officer and Managing Director, bearing primary responsibility for day-to-day management and being the principal architect of the BCS Investment. The appellant's case against him involved additional allegations beyond those made against other respondents, including claims related to his appointment of JVK as consultant and consultancy payments.

[76] Having carefully considered the appellant's submissions and the High Court's analysis, we are satisfied that the learned judicial commissioner correctly absolved the second respondent from liability. Her reasoning demonstrates proper application of relevant legal principles to his specific conduct. Among them are:

Business judgment rule protection for the second respondent

[77] The learned judicial commissioner correctly applied the business judgment rule to protect the second respondent's decisions. As noted in paras [64] of her decision, she ruled that the second respondent's decision was part of 'a collective decision to make the BCS Investment' that was 'honestly arrived at, bona fide and in the best interests of the company as a whole'.

[78] His position as CEO and Managing Director did not disqualify him from business judgment rule protection. Indeed, as the senior executive responsible for implementing Board strategy, he was peculiarly qualified to

assess the BCS Investment's merits. The evidence established his involvement with the project since early 2015, providing substantial knowledge and experience

The appointment of JVK as consultant

[79] The appellant's pleaded case relates to the second respondent's appointment of JVK as consultant and related payments. The judicial commissioner correctly found these actions fell within his authority as Managing Director and were protected by the business judgment rule.

[80] As Managing Director, he possessed broad authority to manage day-to-day operations, including appointing consultants necessary for the company's business. JVK possessed relevant expertise in government contracting and border security, having been instrumental in developing the privatisation proposal. His appointment served a legitimate business purpose.

[81] The consultancy payments were reasonable in amount and frequency, reflecting the value of JVK's services. The fact that JVK was BCS's sole shareholder did not automatically create disqualifying conflict, particularly given that BCS and appellant interests were aligned in securing the privatisation contract.

Good faith and absence of personal interest

[82] The High Court's finding that the second respondent acted in good faith without improper personal interest was well-supported. His credibility assessment by the judicial commissioner In paras [64] noted that his 'testimony under intensive cross-examination did not waiver, nor compromise his defence'.

[83] No evidence suggested he obtained personal financial benefit from the BCS Investment or JVK's appointment. His decisions appeared motivated by company benefit assessment rather than personal gain. His continued efforts to recover invested funds after withdrawal decision further supported genuine motivation by company interests.

[84] The learned judicial commissioner was therefore correct when she dismissed the claim against the second respondent.

A DATING ISSUE AND TIMING CONCERNS OF THE DIRECTORS' CIRCULAR RESOLUTION (DCR)

[85] The appellant challenged the High Court's finding that the DCR signing date was immaterial, arguing this was critical to determining payment legality and propriety. The learned judicial commissioner's approach in para [12] that 'the date they each signed is not of central importance' was not wrong and consistent with established legal principles.

[86] It is our view that the focus should be on the substance of the directors' decision-making rather than technical procedural matters that do not affect the validity of their business judgment. What matters is whether the directors made an informed decision in good faith, not the precise chronology of documentation.

[87] The appellant's contention that signing the DCR on 23 February 2016 would have exceeded the seven-day validity period for accepting the first BCS offer is overly simplistic and does not reflect commercial reality. We accept that business negotiations frequently involve extensions and modifications of initial timeframes, and the evidence did not establish that the original offer had lapsed irretrievably.

[88] More fundamentally, even if there were issues with the timing of acceptance, this would not automatically constitute breach of directors' duties if the decision-making process was otherwise proper.

[89] The learned judicial commissioner correctly recognised that the precise signing dates were not material to the central legal issues. Whether directors signed on 6 January 2016 or 23 February 2016, the key question remained whether they acted with appropriate care, in good faith and in the company's best interests based on the information available to them.

[90] The evidence established that regardless of signing dates, the respondents had substantial prior knowledge of the BCS project and received appropriate briefings before making their decision. The timing of documentation did not affect the substance of their decision-making process or the protection afforded by the business judgment rule.

Adverse inference against the appellant

[91] As established in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, adverse inference can be drawn for 'non-production of not just any witness but an important and material witness to the case'. The deliberate withholding of

evidence is inferred if there is no reasonable explanation for not calling a material witness.

[92] The appellant failed to proffer any reason why these material witnesses were not called. Dr Gavin Hoh, in particular, was central to the BCS project and possessed unique knowledge about its development and viability. His absence from the witness list, without explanation, properly supported the inference that his evidence would not have assisted the appellant's case.

[93] Be that as it may, we do not find this issue to be critical in the overall assessment of the appeal. To our mind, even if the judicial commissioner had unduly invoked an adverse inference against the appellant, it did not nullify the overwhelming evidence in support of the respective respondents' case. This included the evidence proffered by the appellant's own witness such as PW1.

[94] PW1 was not merely any witness but the appellant's own Chief Executive Officer at the material time. PW1's testimony contained several critical admissions that fundamentally undermine the appellant's case:

(a) PW1 explicitly agreed that 'the Board made a reasonable business judgment decision when it decided to approve the BCS investment at £2m on 23.02.2016'. This direct admission by the appellant's own CEO is fatal to the claim that the respondents breached their directors' duties;

(b) PW1 acknowledged that investing in BCS at its early stage gave the appellant a 'competitive edge'. This admission supports the commercial rationale behind the respondents' decision and demonstrates that the investment was made for proper business purposes;

(c) PW1's testimony revealed the strategic necessity of the investment when he:

  (i) agreed that refusing to fund BCS would mean the appellant would not get the competitive edge;

  (ii) acknowledged that BCS would be at liberty to charge higher prices later if the project was secured without early investment;

  (iii) confirmed that not investing would mean losing the advantage of participating in the privatisation project; and

  (iv) testified that the directors were entitled to rely on the expertise of Dr Gavin Ho and the second respondent, and that there was no evidence or reason for the Board to question their motives.

[95] As correctly observed by the High Court in paras [36] of the grounds of decision, 'the evidence of the plaintiff's own witnesses, particularly PW1 and PW6 considered as a whole, imploded the plaintiff's case'.

A THE OBJECTIVE VS SUBJECTIVE TEST ANALYSIS

[96] The appellant argued that the High Court failed to apply the objective limb of the test established in *Petra Perdana*, contending that the learned judicial commissioner focused solely on directors' subjective good faith without proper objective review of whether their decisions were reasonable.

B

The Petra Perdana test

C **[97]** As stated earlier, the Federal Court in *Petra Perdana* clearly established that the test for breach of duty combines both subjective and objective elements.

[98] Therefore, the test is subjective in assessing the director's state of mind and whether the director genuinely considers the exercise of discretion to be in the company's best interest. The test is objective in that the director's assessment is subject to objective review by the courts.

D

The objective element applied

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[99] The objective element requires the court to assess whether 'an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company'.

F

[100] Applying this test to the facts, several factors support the conclusion that reasonable directors in the respondents' position could genuinely believe the BCS Investment would benefit the company. First, the investment leveraged the company's core expertise in trusted identification technology, an area where it had demonstrated world-leading capabilities over two decades. Second, the UK Border Force privatisation represented a substantial government contract with significant revenue potential.

G

H **[101]** Third, the company had already invested resources in the project through staff secondment and proposal development, suggesting management's positive assessment of its viability. Fourth, the respondents brought extensive Board experience and deep knowledge of the company's business to their assessment. Fifth, they received briefings from experienced I management with specific expertise in the relevant technology.

[102] The learned judicial commissioner's conclusion that the respondents' belief was objectively reasonable was therefore well-founded and consistent with the *Petra Perdana* standard.

SECTION 581 RELIEF ANALYSIS

[103] Section 581 reads as follows:

> 581 Power to grant relief
>
> (1) In any proceeding for negligence, default, breach of duty or breach of trust against any person to whom this section applies, if it appears to the Court before which the proceedings are taken that a person is or may be liable, but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case, he ought fairly to be excused for the negligence, default or breach, the Court may relieve him either wholly or partly from his liability on such terms as the Court thinks fit.
>
> (2) If any person to whom this section applies has reason to apprehend that any claim will or might be made against him in respect of any negligence, default, breach of duty or breach of trust, he may apply to the Court for relief, and the Court shall have the same power to relieve him as under this section it would have had if it had been a Court before which proceedings against him for negligence, default, breach of duty or breach of trust had been brought.
>
> (3) This section applies to —
>
> (a) an officer of a corporation;
>
> (b) a person employed by a corporation as an auditor, whether he is or is not an officer of the corporation;
>
> (c) an expert within the meaning of this Act;
>
> (d) a liquidator or person who is appointed by the Court, receiver, receiver and manager or judicial manager that carries out any duty under this Act in relation to a corporation; and
>
> (e) a nominee appointed under a voluntary arrangement to carry out any duty under this Act in relation to a corporation.

[104] Reference is again made to the decision by Nallini J in *Petra Perdana* where she discussed the test to be adopted in determining a breach of fiduciary duty. Her Ladyship held as follows:

> [238] ... The test is nicely condensed in Ford's Principles of Corporations Law (para 8.060), that there will be a breach of duty if the act or decision is shown to be one which no reasonable board could consider to be within the interest of the company.
>
> [239] This test is adopted in *Charterbridge Corpn Ltd v Lloyds Bank Ltd and another* [1970] Ch 62 at p 74, in that, to challenge a decision of the directors the test is whether:
>
> > ... *an intelligent and honest man in the position of the director of the company concerned, could in the whole of the existing circumstances have reasonably believed that the transactions were for the benefit of the company*.
>
> [240] The above principle is often referred to as the 'Charterbridge Principle'.

A [242] It is important to note, following high authority, such as *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, that the court does not substitute its own decision with that of the directors, since the decision of the directors to enter into the JDA is a management decision.

B **[105]** Even if the respondents' conduct could be characterised as constituting some breach of duty, which we do not find, the learned judicial commissioner's alternative analysis under s 581 of the Companies Act 2016 provides additional grounds for absolving them from liability.

C **[106]** The learned judicial commissioner ruled 'it is always easy, with hindsight, to apportion liability, when in actuality the acts and omissions may more reasonably be attributable to inadvertence and unforeseen circumstances' and that 'it is certainly arguable and persuasively so that the defendants ought fairly to be excused for their negligence, default or breach of duty (if any)'.
D

[107] Section 581 empowers the court to relieve directors from liability where they have acted honestly and reasonably and ought fairly to be excused. This provision recognises that commercial decisions involve inherent uncertainties
E and that honest errors in business judgment should not automatically result in personal liability for directors.

[108] The provision requires three elements: honesty, reasonableness, and fairness of excuse. The evidence established that the respondents acted honestly
F throughout the relevant period, believing that their decisions would benefit the company. Their actions were also reasonable given their knowledge of the company's business, their experience in the industry, and the information available regarding the BCS project.

G **[109]** Considering all circumstances, including the respondents' long service to the company, their expertise in the relevant field, the genuine commercial rationale for their decisions and the absence of any personal benefit, it would be unfair to impose liability upon them for what were ultimately honest errors in
H commercial judgment, if indeed they were errors at all.

[110] The BCS Investment represented a reasonable business opportunity that aligned with the company's strategic interests and technical capabilities. The fact that external circumstances prevented its successful completion does
I not justify imposing personal liability on directors who acted in good faith and with reasonable care.

[111] We find the *Charterbridge* principle applicable and the judicial commissioner was not wrong in applying s 581.

The treatment of the eight respondent

[112] The eighth respondent did not appear at trial or give evidence, despite having been properly served with the proceedings through substituted service ordered by the court on 3 July 2019. The appellant contended that judgment should have been entered against him based on O 35 r 1(2) of the Rules of Court 2012.

[113] While the appellant correctly cited O 35 r 1(2) which permits a court to proceed with trial in a party's absence, this general provision does not override the specific procedural requirements for obtaining default judgment. The learned judicial commissioner was right to conclude that 'O 13 r 1 and O 35 r 1 do not avail the plaintiff'.

[114] However, we agree with the learned judicial commissioner in her finding that she was not at liberty to waive production by the appellant of a certificate of non-appearance in Form 12 as required mandatorily under O 13 r 7(1)(a) of the Rules of Court 2012.

[115] The certificate of non-appearance in Form 12 is a statutory prerequisite that cannot be dispensed with, regardless of whether substituted service has been effected. The fact that the eighth respondent was served via substituted service on 5 August 2019 does not excuse compliance with this fundamental procedural requirement.

[116] The judicial commissioner correctly identified that the appellant's claims fell under 'other claims' pursuant to O 13 r 6 of the ROC 2012. This classification has significant procedural consequences that the appellant failed to appreciate. Order 13 r 6 reads as follows:

> 6 Other claims (O 13 r 6)
>
> (1) Where a writ is endorsed with a claim of a description not mentioned in rules 1 to 4, then, if any defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the statement of claim was not endorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had entered an appearance.
>
> (2) Where a writ issued against a defendant is endorsed as aforesaid, but by reason of the defendant satisfying the claim or complying with the demands thereof or any other like reason it has become unnecessary for the plaintiff to proceed with the action, then, if the defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter judgment with the leave of the Court against that defendant for costs.

A (3) An application for leave to enter judgment under paragraph (2) shall be by notice of application which must, unless the Court otherwise orders, and notwithstanding anything in Order 62, rule 10, be served on the defendant against whom it is sought to enter judgment.

B **[117]** Under O 13 r 6, when an action involves 'other claims,' the established procedure is clear — if a defendant fails to enter an appearance, 'the plaintiff may ... proceed with the action as if that defendant had entered an appearance'. The rule expressly precludes the entry of judgment in default of appearance for such claims.

C

[118] Having correctly classified the action under O 13 r 6, the proper procedural sequence required the appellant to subsequently invoke O 19 r 7 (judgment in default of defence) if the eighth respondent failed to file a defence.

D

[119] The absence of any notice of application to obtain judgment in default of defence and the failure to serve such application on the eighth respondent constituted a fundamental procedural defect that could not be overlooked.

E

[120] We must reiterate the established principle from *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 that 'The Rules of Court must prima facie be obeyed'. This principle is not merely aspirational but represents a fundamental tenet of procedural law.

F

[121] The Rules of Court exist to ensure orderly administration of justice and protect the rights of all parties. They cannot be bypassed merely because a party chooses not to participate in proceedings. To allow otherwise would undermine the integrity of the civil justice system.

G

[122] The appellant's failure to comply with mandatory procedural requirements cannot be excused by the eighth respondent's non-participation. Had the appellant followed the correct procedural sequence under O 13 and 19 of the Rules of Court 2012, the outcome may well have been different.

H

[123] For these reasons, we find no error in the learned judicial commissioner's approach and affirm her decision to refuse judgment against the eighth respondent.

I **[124]** Importantly, the evidence established that the BCS Investment was a collective Board decision made after appropriate briefings and deliberation. The eighth respondent's participation in this collective decision-making process was not materially different from that of the other respondents who did testify.

[125] Given that the appellant failed to establish breach of duties against the respondents who did appear and testify, there were no grounds for finding such breach against the eighth respondent based solely on his non-appearance.

ASSESSMENT OF APPELLANT'S ALTERNATIVE ARGUMENTS

The misrepresentation claims

[126] The appellant contended that the second respondent misled the Board by causing payments totalling £1.4m when he had represented that estimated costs would be approximately £600,000, and by representing that no more than £1m would be disbursed when £1.8m had already been paid.

[127] The High Court correctly found that these allegations did not establish breach of directors' duties by the other respondents. Business circumstances often require adjustments to initial projections and the evidence did not establish that these variations were made dishonestly or without reasonable business justification.

[128] Moreover, the business judgment rule specifically protects directors from liability for honest errors in commercial judgment. The fact that actual expenditure exceeded initial estimates does not automatically constitute breach of duty, particularly where the variations occurred in response to evolving business circumstances.

The recovery efforts claim

[129] The appellant criticised the respondents for failing to recover the invested funds despite undertakings given at various Board meetings. However, the evidence established that recovery efforts were delegated to management and that external circumstances, including BCS's ultimate winding up, made recovery impossible.

[130] The failure to achieve recovery does not constitute breach of directors' duties where the failure resulted from factors beyond the directors' reasonable control. The respondents' decision to delegate recovery efforts to management was appropriate given their respective roles and responsibilities.

The equipment transfer allegations

[131] The appellant's allegations regarding equipment transfers to Iris Tech UK worth £168,538.34 were not established to constitute breaches of duty by the respondents other than the second respondent. These transfers appeared to

be operational matters within management's authority rather than Board-level decisions requiring specific director approval.

[132] Even if these transfers were improper, which was not established, they would not affect the business judgment rule protection available to the respondents for their approval of the BCS Investment itself.

NO APPELLATE INTERVENTION REQUIRED

[133] The law on appellate intervention to findings of fact is well-settled. An appellate court does not interfere with the trial judge's conclusions on primary facts unless it is satisfied that the trial judge was 'plainly wrong'.

[134] We are guided by the decision of the Federal Court in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67, where the Federal Court held that in applying the 'plainly wrong' test, a higher court can overturn a lower court's decision if it finds the lower court's factual findings to be demonstrably incorrect or unreasonable. This test essentially means that an appellate court will only interfere with a lower court's decision if it is so clearly wrong that no reasonable judge could have reached that conclusion based on the evidence presented.

[135] The 'plainly wrong' test operates on the principle that the trial court has had the advantage of seeing and hearing the witnesses and their evidence, as opposed to the appellate court that acts on the printed records. As the Federal Court noted in *Ng Hoo Kui*, this principle recognises the trial judge's superior position in assessing credibility and weighing evidence.

[136] The Federal Court in *Ng Hoo Kui* at para [54] identified several non-exhaustive examples that satisfy the 'plainly wrong' test, including material error of law, critical factual findings which had no basis in evidence, demonstrable misunderstanding of relevant evidence, demonstrable failure to consider relevant evidence, misdirection by the judge, absence of evidence to support a particular conclusion, material inconsistencies or inaccuracies and failure by the trial judge to appreciate the weight and bearing of circumstances admitted or proved.

[137] Applying the 'plainly wrong' test, it is our view that the learned judicial commissioner had properly considered all relevant evidence. She did not make any significant errors in interpreting the law or reach conclusions that are not supported by the facts on the record.

[138] The appellant's various criticisms of the High Court's findings

constitute disagreements with the learned judicial commissioner's conclusions rather than demonstrations that those conclusions were plainly wrong. As the Federal Court noted in *Ng Hoo Kui* at para [151]: 'It is not sufficient for the Court of Appeal to reverse the findings on fact merely because on a particular point of evidence, it disagreed with the conclusion made by the trial court on whether one party or the other is to be believed on the evidence that they gave in court'.

[139] Her comprehensive analysis of the evidence, proper application of legal principles and reasoned conclusions demonstrate careful judicial consideration of all relevant factors. The High Court's findings were based on a thorough evaluation of witness testimony, documentary evidence and expert reports conducted over a 25-day trial. The learned judicial commissioner had the distinct advantage of observing witness demeanour and assessing credibility first hand, advantages that this court does not possess when reviewing the written record.

[140] Where the trial judge's conclusions can be supported on a rational basis in view of the material evidence, the fact that an appellate court might have decided differently is irrelevant. As the Federal Court emphasised in *Ng Hoo Kui* at para [148]: 'a finding of fact that would not be repugnant to common sense ought not to be disturbed'.

CONCLUSION

[141] We are satisfied that the learned judicial commissioner's decision was correct in law and fact. Her analysis comprehensively addressed all the key issues raised by the parties and reached conclusions that were well-supported by the evidence and consistent with established legal principles.

[142] Directors who act honestly, with reasonable care and in good faith are entitled to protection from liability even when their business decisions ultimately prove unsuccessful.

[143] Courts must resist the temptation to apply hindsight analysis and must instead focus on the reasonableness of decision-making processes based on circumstances existing at the time.

[144] For all the reasons set out in this judgment, we dismiss this appeal with costs. The learned judicial commissioner's decision dismissing the appellant's claims against all respondents is affirmed in its entirety.

A *Appeal dismissed with costs; decision of JC affirmed.*

Reported by Dzulqarnain Ab Fatar

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